

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 08-47

April 16, 2008

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Issuance of Compliance Specifications and Conduct of
Supplemental Hearings

Obtaining remedial relief for victims of unfair labor practices is one of the most important aspects of the Agency's mission. Over 90 percent of meritorious unfair labor practice charges are promptly resolved by settlement in regional offices, most often informal settlements, pursuant to which remedies are provided without the need for a hearing, Board decision, or circuit court litigation. Accordingly, the Agency has an enviable record of resolving the vast majority of meritorious charges filed in an extremely expeditious manner, providing prompt remedies to discriminatees and other victims of unfair labor practices.

In the small percentage of cases in which formal compliance must be pursued, the Agency currently has a goal to obtain compliance with outstanding Board orders and court judgments within the following time targets¹:

Category III	91 days
Category II	119 days
Category I	147 days

Under these current performance standards, most formal compliance cases are resolved quickly. Nevertheless, the Agency recognizes its obligation to continue to improve its performance and prevent delays in the cases that are not resolved through formal or informal settlement, or non-Board adjustment.² Although small in number, those cases in which it is necessary to hold

¹ Compliance Manual Section 10692.1. These targets include the 60 day posting period.

² In *Harding Glass Company, Inc.*, 500 F.3d 1, the U.S. Court of Appeals for the First Circuit criticized the Board for the lengthy delays in case processing. The Court directed the Board to file a supplemental memorandum explaining measures the Agency is taking to improve its compliance procedures to avoid lengthy delays in case processing. In its response, the Office of the General Counsel outlined the following four measures the agency has taken to reduce delays in compliance proceedings: institute a review of open compliance cases; establish time targets for hearings in compliance cases; increase the use of investigatory subpoenas in compliance cases; and file Motions for Partial Summary Judgment in compliance cases with the Administrative Law Judge, rather than the Board.

compliance hearings should also receive prompt attention.³ Often, however, these cases involve complex calculations, ancillary litigation or recalcitrant respondents that challenge our best efforts to bring them to conclusion quickly. In keeping with the goal of providing prompt remedies, and notwithstanding the obvious challenges, Regions are expected to issue compliance specifications within the above time targets in the event of noncompliance with a court judgment.⁴

Notwithstanding this expectation, experience has demonstrated that it may be impossible to issue a compliance specification within the above time targets in some cases due to the nature of the issues. These cases will be excused as long as a Region submits an acceptable Schedule of Action Plan with its monthly overage compliance report and then adheres to that plan. The Schedule of Action Plan should set forth the work that needs to be completed before the compliance specification can issue and a reasonable time line within which the work will be completed. If the Region believes it does not have adequate resources to complete the work within a reasonable period of time, the Region should contact the Division of Operations-Management for assistance. The Region's Schedule of Action Plan will be reviewed by the Region's Assistant General Counsel who will determine whether non compliance with the performance goal will be excused.

The timely issuance of a compliance specification is the first step toward providing a prompt remedy in a contested case. The second step is the conduct of the compliance hearing within a reasonable time period. The current goal for holding unfair labor practice hearings is within 100 *median* days of the issuance of complaint. Our recent experience is that Regions are easily meeting this goal, opening complaint hearings within a median time of 75 days. Given the availability of hearing slots and trial counsel and the limited number of compliance hearings actually conducted, we believe it is desirable to set a 100 calendar day goal for the opening of a compliance hearing after specification issuance. A CATS run of these cases reveals that currently nearly 90% of such cases are, in fact scheduled for hearing within 100 days of the issuance of a compliance specification. We believe this is an achievable goal in most cases. Accordingly, Regions will now be expected to hold compliance hearings within 100 days of the issuance of a compliance specification. As with complaints, if the case must be postponed for good cause such as settlement discussions or substitution of counsel those cases will be excused.

³ In FY 07, sixty-two compliance specifications issued and in FY 06, forty-two compliance specifications issued.

⁴ Of course, Regions should continue to consider the advisability of consolidating compliance matters with initial ULP complaints to maximize the likelihood that meaningful compliance results can be secured as early as possible in the casehandling process. See Memorandum OM 07-59, dated May 17, 2007, "Consolidating Compliance Issues with ULP Complaints Expediting Casehandling in "Default" Cases."

For various reasons the Region may determine that it is not possible to open the compliance hearing within 100 days of the issuance of the specification. For example, the answer to the specification or the disclosure of additional evidence may require that backpay calculations be revised or that additional investigation be conducted regarding an “inability to pay” claim or an alter ego/personal liability issue. Once this determination has been made, the date of the decision to postpone the supplementary hearing should be entered in CATS in the Compliance Specification window of the Settlement/Withdrawal screen. The following case note should be entered in CATS as an “Office Management Note” and the topic of “Compliance”:

“On _____, the Region determined it was necessary to further investigate issues raised after the issuance of the compliance specification.”

By entering the date in the Settlement/Withdrawal screen, the case will be moved from Section III(b) of the Overage Compliance Report (Compliance situations pending Contempt, Advice or Compliance Specification Issued) to Section I (Overage Compliance Situations) or Section II (Compliance Situations Within Operating Goals). These cases will be excused as long as Regions submit an acceptable Schedule of Action Plan with its monthly overage compliance report and then adheres to that plan. The Schedule of Action Plan should set forth the work that needs to be completed before the compliance hearing can be held and a reasonable time line within which the work will be completed. If the Region believes it does not have adequate resources to complete the work within a reasonable period of time then the Region should contact the Division of Operations-Management for assistance. As with delayed issuance of a compliance specification, the Region's Schedule of Action Plan will be evaluated by the Region's Assistant General Counsel who will determine whether non-compliance with this performance goal is excused.

Regions should review all cases in which compliance specifications have issued and are currently pending compliance hearing. If the compliance hearing was not scheduled within 100 days of the issuance of the specification, the steps outlined above (enter date in Settlement/Withdrawal screen and add case note) should be taken.

Section 102.56(b) of the Board's Rules and Regulations provides that if a respondent disputes the accuracy of the backpay amount or the premises on which it is based as alleged in the compliance specification, its answer to the compliance specification shall specifically state the basis for the disagreement, setting forth in detail the respondent's position as to applicable premise and furnishing appropriate alternative figures and amounts. General denials by the respondent to allegations regarding the calculation of backpay are not sufficient and do not comply with the requirements of Section 102.56(b) and (c) of the Rules and Regulations. After careful review of the answer, if the Region decides

the answer is inadequate, a motion for summary judgment or partial summary judgment could be filed with the administrative law judge or the Board.⁵ In order to avoid potential lengthy delays in the holding of the compliance hearing, motions for partial summary judgment should normally be filed with the administrative law judge at the same time that the Region is proceeding to hearing on the case. In those situations where the Region determines that the motion for partial summary judgment should not be filed with the ALJ, this determination must be discussed with Operations-Management.

If you have any questions regarding this memorandum, please contact your Assistant General Counsel or Deputy or the undersigned.

/s/
R. A. S.

cc: NLRBU
Release to the Public

MEMORANDUM OM 08-47

⁵ Before filing a motion with either the Board or with the administrative law judge, respondent should be advised in writing that the answer is deficient and, following the procedures in Section 10652.1 of the Compliance Manual, allow the respondent a period of time, typically not to exceed 1 week, to file an amended answer.